

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1109

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

RAYMOND RICARD,

Appellant.


Docket No. 77-1109

REPLY BRIEF FOR APPELLANT
RAYMOND RICARD

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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The brief submitted by the Government is extraordinary for the fact that virtually none of the cases relied upon support the propositions for which they are cited. The inaccuracies of the brief have necessitated this lengthy response.

I

THE SUPERSEDING INDICTMENT POSED A
REALISTIC LIKELIHOOD OF VINDICTIVE-
NESS FOR APPELLANT'S DECISION TO
PROCEED TO TRIAL.

The Government admits that 12 days before trial the prosecutor called defense counsel, asked if the defendant planned to go to trial, and then, upon receiving an affirmative response, told counsel, "In that case, I am informing you that the Government is bringing a superseding indictment." The Government further concedes that the elevation of the petty offense to a felony was not based upon the discovery of any new facts, but only upon a "reconsideration" of the information it possessed at the time the information had been filed (Government Brief at 7). Abandoning the theory it had urged on the court below -- that the superseding indictment was justified by information learned by the prosecution subsequent to the filing of the indictment -- the Government still denies that there was any violation of the Pearce-Blackledge doctrine. It manages this only by conspicuously avoiding any reference to the test outlined in Blackledge* -- whether there is a

*The Government insidiously substitutes a "chilling" effect test for the "realistic likelihood of vindictiveness" test utilized in Blackledge and its progeny (Government Brief at 8-9). Under the rule of Blackledge, a defendant does not have to establish that the exercise of his rights was inhibited (cf. Younger v. Harris, 401 U.S. 37 (1971)), but only that the Government's action created "an apprehension of ... a retaliatory motivation" on the part of the Government. Blackledge v. Perry, 417 U.S. 21, 28 (1974).

"realistic likelihood of vindictiveness" by the prosecutor's conduct in the case -- and contends that no factual basis is necessary to justify the increase in the charge. This argument, like the Government's contention that Blackledge does not apply at a pre-trial stage (Government Brief at 8), is frivolous.

The Government claims that Pearce was complied with because the prosecutor explained on the record that the enhanced charges were based on her realization, months after the filing of the information, "that the magnitude of the offense was actually greater than had first appeared" (Government Brief at 8). However, while the Government satisfies the requirement that the reasons be on the record, it conveniently omits the critical requirement of Pearce that the reasons

... must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

Pearce, supra, 395 U.S. at 726
(emphasis added).

See also United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976); United States v. Mallah, 503 F.2d 971, 987 (2d Cir. 1974). Indeed, though the Government's reason affirmatively appears on the record, it is not based upon any new "factual data" (Pearce, supra, at 726) or "objective information" about appellant's conduct, and thus is constitutionally inadequate. In fact, the prosecutor here did what the

the judge in Pearce and the prosecutor in Blackledge had done -- "reexamine" the facts they had possessed all along.

Contrary to the Government's claim that, in United States v. Mallah, supra, this Court rejected a claim similar to that made by appellant (Government Brief at 9), that case directly supports appellant Ricard's claim. The Government's action in that case was permissible because, in contrast to the instant case, the added charges were based upon different acts than the ones initially charged.* As this Court explained:

It is one thing to increase a charge from manslaughter to murder, and quite another to charge a defendant, subsequent to a successful appeal, with a second murder. In the words of [United States ex rel. Williams [v. McMann, 436 F.2d 103 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971)]], "Pearce would have application, if a prosecutor ... charged a defendant whose first conviction had been set aside, with a more serious offense based upon the same conduct." 436 F.2d at 105 (emphasis added).

United States v. Mallah, supra, at 988.

In the instant case, the Government does not deny that the higher charge was based upon the same conduct as the lesser offense originally charged. Moreover, the Government has no reason to fear that appellant's position means that a prosecutor could never charge a defendant with greater crimes "no matter what new developments arose after the first charges were filed" It is precisely because (as the Government concedes) no new developments occurred that the elevation of the charges was impermissible.

*The Supreme Court has just granted certiorari in a case involving the question of whether a prosecutor in plea bargaining may threaten to bring an additional indictment against a defendant if he does not accept the bargain the prosecutor offers. Bordenkircher v. Hayes, No. 76-1334.

The Government further argues that Pearce and Blackledge should not apply to appellant's case because the abusive conduct of the prosecutor was committed prior to trial (Government Brief at 8). Courts, however, have been flexible in applying the Blackledge doctrine wherever a potential for prosecutorial vindictiveness exists. Thus, prosecutors have been prohibited from increasing charges after mistrials (United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974)), as well as after the withdrawal of guilty pleas (United States v. Johnson, 537 F.2d 1170 (4th Cir. 1975); United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974); see also United States v. Butler, 414 F.Supp. 394, 395 (D.Conn. 1976) (Blackledge applies where enhanced charges are brought after the breakdown of plea negotiations)). The words of Judge McGowan, writing for the court in Jamison, supra, at 416, are instructive:

The question for us, therefore, is whether to differentiate between attacks which defendants make on the fairness of criminal proceedings before and after they are complete. We decline to draw such a distinction, primarily because of its "implications ... for the sound administration of justice." United States v. Tateo, 377 U.S. [463,] 466, 84 S.Ct. at 1589.

The only issue is whether the prosecutorial conduct posed a "realistic likelihood of vindictiveness for the assertion of rights," not whether the behavior occurred before or after trial.

Relying upon North Carolina v. Alford, 400 U.S. 25 (1970), the Government makes the fanciful argument that appellant's

claim would preclude plea bargaining. In Alford, the Supreme Court approved a guilty plea motivated by a desire to avoid a possible death penalty. However, offering the defendant the opportunity to avoid the maximum punishment permissible for the crime as charged is not comparable to increasing the crime charged when the defendant chooses to exercise his right to a jury trial.

The Government's characterization of the phone call to defense counsel as a "courtesy" is, in Judge Wyzanski's words, a "chutzpadich contention...." Silverman v. United States, Doc. Nos. 76-2073, 76-2085, slip op. 3937, 3943 (2d Cir., May 31, 1977). In any event, the Government errs in asserting that appellant's claim would evaporate without the prosecutor's "candid" admission that the superseding indictment was triggered by Ricard's demand for a trial. Blackledge makes clear that the accused need not prove that he was the actual victim of retaliation, but only that he "apprehended" a vindictively imposed penalty for the assertion of his rights. Blackledge, supra, at 28; United States v. Johnson, supra, at 1173. That the prosecutor inadvertently "spilled the beans" makes the instant case a stronger one than Blackledge, for here there is proof on the record of actual vindictiveness.

In sum, the Government concedes everything but error. It does this only by ignoring the case law. The superseding indictment must therefore be dismissed.

II

SINCE THERE WAS A FULL EVIDENTIARY HEARING ON THE PROPRIETY OF THE OFFICER'S CONDUCT, COUNSEL DID NOT WAIVE THE SEARCH ISSUE.

In Point II of its brief, the Government condemns appellant for doing precisely what it does in both points of its brief -- shifting position on appeal and advancing arguments not pressed below. However, the Government errs in contending that the search issue was waived and the seizure of the tin-foil packet was proper.

Relying upon United States v. Braunig, Doc. No. 76-1448, slip op. 2773 (2d Cir., April 11, 1977), the Government claims that counsel below conceded the search issue by his single response that probable cause would have existed if the court credited the police officer's version of the facts. In Braunig, the failure to raise the issue had eliminated the necessity for a factual hearing. Hence, counsel's argument on appeal was unsupported by competent evidence. Braunig, supra, slip op. at 2780. In the instant case, a complete record was made as to the police officer's knowledge and conduct at the time of the stop as well as the usual police procedures in speeding violations. That no waiver occurred here is indicated by the opinion of this Court in the recent case of United States v. Linda DiStefano, Doc. No. 76-1581, slip op. 3539 (2d Cir., May 16, 1977). As in that case, no waiver occurred on claims

raised only "indirectly" by the defense because "both sides" fully inquired into the basis of the arrest, thus exploring the issue of probable cause extensively." DiStefano, supra, slip op. at 3547. Thus, the facts were before the trial court not only so as to enable it to rule on the issue, but to support an appellate argument and a finding that the officer acted illegally in grabbing the tinfoil packet.

That defense counsel became confused at one point of the 26-page debate between the court and the parties on the suppression motion is understandable (see minutes of October 5-6, 1976, at 26-38, 54-68). The Government acknowledges this by making on appeal an argument that the Assistant United States Attorney expressly waived below. The Government now claims that the officer's observation of the speeding vehicle justified him in performing a full search of appellant even though he did not intend to place Ricard under arrest at the time of the search (Government Brief at 12-13). However, the following colloquy occurred below:

THE COURT: ... If -- and I emphasize the word "if" -- if the facts were that there was a stopping, going 75 miles an hour on the New Jersey Turnpike, a checking of license and registration revealing no irregularities, and then if at that point the officer simply started patting him down and that led to the discovery of the object --

[THE ASSISTANT U.S. ATTORNEY]: I concede that would be unlawful.

(Transcript at 56).

Since both parties became equally lost in the maze of hypo-

theticals devised by the court during the protracted oral argument, there is good cause to relieve the parties of any waiver that might otherwise have occurred. See Federal Rules of Criminal Procedure, Rule 12(f); United States v. Braunig, supra, at 2779.

The Government's remaining arguments require little discussion. That the officer had probable cause to arrest appellant for the traffic violation of speeding cannot support the search. The Supreme Court made clear, in United States v. Robinson, 414 U.S. 218 (1973), and Gustafson v. Florida, 414 U.S. 260 (1973), that where there has been an arrest for a traffic infraction, it was "the fact of the lawful arrest which established the authority to search...." Robinson, supra, at 235. In the instant case, the officer admitted that no custodial arrest had occurred prior to the search. Nor do any cases cited by the Government (Brief at 12-13) support the proposition that probable cause to arrest for a traffic offense can support a full-blown search unless it is incident to an arrest. In fact, State v. Boykins, 50 N.J. 73, 232 A.2d 141, 143 (1967), which the Government cites, is contrary to the Government's position. In that case, the court held that "[a] traffic violation as such will justify a search for things relating to it." Under this standard, the officer's seizure of a packet (which he suspected to contain drugs) was improper, for the seizure was unrelated to the speeding violation.

The attempt to justify the seizure under the "plain view"

doctrine is also erroneous. In United States v. DiStefano, supra, on which the Government relies (Brief at 13), the officers were investigating a bank robbery when they observed a bag of the type used by the bank for bagging coins. DiStefano, supra, slip op. at 3542, 3549-3950. Under the circumstances, the officers had reason to believe that the money bags were contraband. In the instant case, however, the patrolman suspected no more than a traffic infraction; there was nothing to indicate that appellant was less than candid when he said that there was nothing of consequence in the package. Officers cannot seize objects in "plain view" unless they are plainly associated with some crime.

The Government concludes by arguing essentially that United States v. Magda, 547 F.2d 756 (2d Cir. 1976), supports the seizure of anything within a police officer's field of vision which arouses his curiosity (Brief at 14-15). This argument misses the point that the officer's conduct in Magda was reasonable only because he was able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Magda, supra, at 758, citing Terry v. Ohio, 392 U.S. 1, 21 (1968). In contrast, the intrusion in the instant case was motivated by a bare hunch.*

*The Government's claim that the seizure was "upon invitation" is irrelevant, for no issue of consent was raised -- or could be raised -- either in the district court or in this Court. Even if appellant's testimony on this point was cor-

The Government thus errs b. i in its contention that the search issue was waived and in its attempts to justify the search.

CONCLUSION

For the above-stated reasons and the reasons set forth in appellant's main brief, the judgment of the District Court should be reversed and the indictment dismissed (Point I): alternatively, the evidence should be ordered suppressed and the indictment dismissed (Point II).

Respectfully submitted,

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(Footnote continued from the preceding page)

rect, he did no more than submit to the officer's authority in telling him to go ahead and remove the packet if he wanted it. In any event, the court credited the officer's version of the search, in which the officer acted without any words from appellant.

CERTIFICATE OF SERVICE

June 8, 1977

I certify that a copy of this ^{reply} brief ~~and appendix~~ has been mailed to the United States Attorney for the Southern District of New York.

Barry Bassis